

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 13212, of Richard Best President of the Dupont Circle Citizens Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Acting Administrator of the Building and Zoning Regulations Administration, dated February 1, 1980, that an application for a building permit filed on November 2, 1978 should be processed under the then applicable SP-2 zoning classification for property at 1615 New Hampshire Avenue, N. W., (Square 155, Lot 834) currently zoned SP-1.

HEARING DATE: April 16 and May 7, 1980

DECISION DATE: July 2, 1980

FINDINGS OF FACT:

1. The subject property is located on the northeast corner of the intersection of Corcoran Street, and New Hampshire Avenue and is known as 1615 New Hampshire Avenue, N. W. It is in an SP-1 District.
2. The subject site is within the Dupont Circle Historic District.
3. The subject lot is approximately 6,660 square feet in land area. It has been utilized as a commercial parking lot and has been for over twenty years. Certificate of Occupancy, No. B 14330 was issued December 15, 1958 for such use.
4. The subject site was zoned SP until September 22, 1978, at which time it was zoned SP-2. The subject site was rezoned from SP-2 to SP-1 on June 22, 1979.
5. A building permit application was filed on November 2, 1978 with the District of Columbia by the then contract purchaser of the site, Holland and Lyons. At the time of the application, the site was zoned SP-2, which allows construction of a ninety foot high apartment house as a matter-of-right.
6. Holland and Lyons sought, and its successor in interest Middle States Construction Corp., hereinafter referred to as the "Intervenor" seeks, to construct a forty unit apartment house on the subject site pursuant to the SP-2 zoning envelope.

7. Building permits for an SP-2 structure were issued to Holland and Lyons on February 20, 1980. Intervenor is the present owner of the site and has assumed those permit rights and is presently prepared to commence construction on the site.

8. The Zoning Administrator testified that the plans submitted with the building application on November 2, 1978, were sufficiently complete so as to allow their orderly processing for determination of compliance with applicable zoning regulations. The Board so finds.

9. The design submitted on November 2, 1978 was for a trapezoid-shaped structure whose main entrance was from a driveway cutting through the site at the southeast. The northeast elevation paralleled New Hampshire Avenue and the south paralleled Corcoran Street, on which they fronted, respectively. The building was cantilevered out above the ground level base up to the sixth floor. The seventh floor was set back slightly and the eighth and ninth floors set back further from the seventh. Both the New Hampshire Avenue and Corcoran Street elevations were asymmetrical as to window-bay articulation but featured parallel rows of projecting balconies on the second through sixth floors. At the southeast entrance, the facade was flat and symmetrical. The basic structure was ninety feet in height topped by thirteen foot penthouse.

10. The plans as filed on November 2, 1978 with the Zoning Administrator did not show sufficient residential recreation space requirements to meet the requirements of Paragraph 4302.23. Also, a record lot had not been obtained as of this filing date.

11. The architect testified that any deficiency as to recreation space could have been remedied by minor adjustment of the penthouse dimensions and rearrangement of some interior partitions in the lobby level. These adjustments would not have been substantial in that no change on building height, FAR, yard or lot occupancy requirements would have occurred as a result of these adjustments. The Board so finds.

12. At the time of application, the site was subject to the provisions of D. C. Law 1-80, entitled "The Historic Sites Subdivision Amendment of 1976." Pursuant to D. C. Law 1-80, a record lot could not be issued unless the proposed subdivision had been submitted for historic sites subdivision review by the Joint Committee on Landmarks and the Mayor's Agent. Submission, for that review was made by November 1, 1978. Issuance of the record lot was barred by imposition of a 180 day delay order by the Mayor's Agent for D. C. Law 1-80 beginning on December 29, 1978.

During the 180 day delay, the purchaser and others were required to enter into negotiations to attempt to find a means of preserving the subject land.

13. Revision of the plans to fully comply with the residential recreation space requirement during the 180 day delay did not occur since no building design review had taken place. During the delay, on March 3, 1979, a new law requiring design review became effective. That law is entitled "The Historic Landmark and Historic District Protection Act of 1978", D. C. Law 2-144.

14. Under D. C. Law 2-144, the design approval of the Joint Committee and the Mayor's Agent for D. C. Law 2-144 was and is a prerequisite for building permit issuance for this site.

15. By transmittal of May 14, 1979, the Chief of the D. C. Permits Branch referred the plans, dated November 2, 1978, to the Joint Committee for review on May 17, 1979. The Committee would not recommend issuance of building permits unless and until the applicant agreed to modify the design in accordance with the requirements of the Committee.

16. Design revisions were made by the architect in consultation with a member of the Committee and were approved by the Joint Committee on June 21, 1979 and submitted to the Zoning Regulations Branch for review on July 13, 1979.

17. The Joint Committee modified the initial design filed on November 2, 1978. The New Hampshire and Corcoran Street elevations were reworked to more closely echo the rhythm and fenestration of surrounding townhouse structures. The set back now begins at the fifth floor rather than the sixth; the seventh, eighth and ninth floors are, respectively, set back further. The New Hampshire Avenue facade houses the central main entrance, off a semi-circular drive and is now symmetrical. There are bay window projections running from the ground to the fifth story, at the center and penultimate bays on the New Hampshire Avenue frontage, replacing the International Style balconies and horizontal bands of windows of the initial design concept. The overall height of the structure has been reduced from 103 to ninety-three feet, including the penthouse. The cornice line at the fifth floor level follows the cornice lines of adjacent nineteenth century structures on New Hampshire Avenue. The use, number of dwelling units, bulk and basic triangular configuration of the structure remained unaltered from the original plans through the Joint Committee design modification.

18. The Zoning Administrator sought the advice of the Corporation Counsel's office as to whether the plans as modified by the Joint Committee should be reviewed under SP-2 regulations by virtue of Sub-section 8103.5 or under SP-1 regulations

applicable to the subject areas as of June 22, 1979.

19. Upon the advice of Corporation Counsel that Sub-section 8103.5 operated to vest SP-2 review rights as of November 2, 1978, the initial filing date, the Zoning Administrator reviewed the Joint Committee modified plans under SP-2 regulations.

20. The Zoning Administrator, testified that under SP-2 regulations, three deficiencies not substantial in nature existed as to the second set of plans filed on July 13, 1979, namely a lack of record lot, insufficient court dimensions, and insufficient recreation area dimensions on the roof. The basis of his determination that the deficiencies were not substantial was that there was less than two percent deviation between the uncorrected and finally corrected plans. The aforementioned deficiencies were subsequently corrected in the third set of plans that were filed with the Zoning Administrator on December 17, 1979. Said plans were approved by the Zoning Administrator on February 1, 1980. A building permit was issued on February 20, 1980.

21. The Joint Committee staff testified that the corrected plans were then resubmitted to the Mayor's Agent who determined that the corrections were minor and did not effect his previous recommendation that the design of the new construction and the character of the historic district are not incompatible.

22. The referral of the plans back to the Mayor's Agent and the Zoning Administrator's request for a Corporation Counsel's opinion on the vesting of review rights occurred after the zoning change of the subject site to SP-1 became effective. These governmental actions delayed the time in which the applicant could obtain the permit.

23. The appellant, through its representatives, reviewed the original plans and was informed of the Zoning Administrator's determination that SP-2 rights had vested for the subject site by correspondence from the Corporation Counsel's Office and the Mayor's Agent in September of 1979. The subject appeal was filed on February 25, 1980.

24. Neither the representative of the Intervenor, Michael Rubin, nor Holland and Lyons, received notice of the present appeal until March of 1980, after the intervenor had purchased the site. The Intervenor testified that it purchased the subject site at a cost reflecting SP-2 zoning rather than SP-1. A building permit for SP-2 construction had been issued prior to Intervenor's purchase. The Intervenor further testified that it would not have bought the property unless and until a valid

building permit to build under SP-2 regulations were issued.

25. The Intervenor testified that it relied on the determination by the Zoning Administrator that SP-2 rights vested for the site by operation of Sub-section 8103.5 and in good faith purchased the property for \$225,000 in excess of the lot's worth if zoned SP-1 and expended in excess of \$45,000 for permit costs, settlement costs, and architectural, legal, and contractor's fees which it otherwise would not have incurred.

26. Advisory Neighborhood Commission 2-B, by letter of April 16, 1980 and at the public hearing, supported the Appeal concurring with the Appellant's grounds.

27. The Appellant argued that the initial building permit application filed in the Zoning Administrator's office on November 2, 1978 was for a building with an overall height of 103 feet, including the penthouse, with a setback at the 6th, 7th, 8th, and 9th floors. The entrance was located at the corner of Corcoran and New Hampshire and the windows fell in horizontal bands, some with balconies. No area in the plans was designated recreational space. Areas of the roof from the penthouse to the edge were less than twenty-five feet in linear dimension. The Appellant further argued that the building plans of November 2, 1978 were resubmitted to the Joint Committee on Historic Preservation with no change in elevation and bulk on May 17, 1979. No alterations in the design had been made to meet the recreational open space requirements of SP-2 under Paragraphs 4302.21 or 4302.23 of the Zoning Regulations. The uses and dimensions were not complete enough to meet Sub-paragraph 8103.212 of the Zoning Regulations. Not all the dimensions were given for the roof areas.

28. The Appellant argued that the building plans of November 2, 1978 were never signed and approved for zoning. The Zoning computation sheet ZA-78-899 was blank in the sign-off spaces, nor was a building permit ever issued for these plans.

29. The Appellant contends that a significantly different building was presented to the Joint Committee on Landmarks through the second set of plans. It differed from the November 2, 1978 plans in that the shape of the plan changed and the corner at New Hampshire and Corcoran was filled in. The flat facade along Corcoran had been altered so that bays protruded. The fenestration was changed from horizontal bands to separated windows with a more vertical emphasis. The international style balconies were removed and the beginning of the set-backs was changed from the 6th to the 5th floor. The height of the building, including the roof structure, had been lowered from 103 feet to ninety-three feet. A stronger cornice line had been added at the 5th floor.

The new plans still failed to meet the requirements of Paragraphs 4302.21 and 4302.23 of the Zoning Regulations, requiring SP-2 recreational space, and Sub-paragraph 8103.212 calling for labeling of all uses in the plans. The building finally approved, had a different Zoning Computation Sheet, no. 79-711, and was signed by Joseph Bottner on February 5, 1980 for compliance with the SP-2 Zoning Regulations. It also differed from the second building plans submitted to the Zoning Regulations Division on July 13, 1979, twenty-six days after the subject site was designated as SP-1. The changes involved a setback and redistribution of the roof structure in order to make room for the recreational space, as well as redefining interior areas of the building as recreational space in order to meet this requirement and a change in court dimensions.

30. The Appellant argued that on February 8, 1980 the Joint Committee passed the third set of plans for the building, which were substantially different from that of November 2, 1978 in regard to height, window treatment, lot occupancy, bay windows, the beginning of set backs, placement of the front door and the plan on the lot. The recreational space zoning requirement was finally realized in this third set of plans and a building permit issued fifteen months after the architect had been informed on November 21, 1978 by the zoning administrator's office that this requirement must be met and eight months after the site had been rezoned from SP-2 to SP-1.

31. Additionally, the Appellant argued that the proposed building if built would constitute a non-conforming structure under Sub-section 4307.3 of the Zoning Regulations which states as follows:

"For the purpose of this section, "Conforming Structures" shall be any structure for which a valid application for a building permit existed at least six months before the change was made from one Special Purpose District to another Special Purpose District or before the height, area and bulk regulations of the Special Purpose District were amended."

32. The Appellant cited a memorandum from the Corporation Counsel's Office to Steven Sher, dated October 16, 1978 concerning the issue of vesting of rights in the case of a zone change. The memorandum stated that rights vested only if a case has been argued before and finally decided by the Board of Zoning Adjustment. Otherwise in cases applied for but unargued and undecided the date of the zone change prevails and the date on

which the new zone becomes effective is determinative.

33. The Appellant argued that the Board of Zoning Adjustment must find that it must apply this rule consistently. Having required the applicant in BZA case No. 12783 to prove before the Board the need for an area variance because the SP text had changed to SP-2 before the applicant's earlier BZA application had been heard, it would be wholly inconsistent for this Board to rule that 1615 New Hampshire was vested and 1752 to 1756 N Street not. The cases are very similar in that both involve parking lots, both had the problem of a 180 day delay order from the State Chief Preservation Officer and both experienced a zone change after their plans had been filed with the Zoning Administrator. The Appellant in BZA No. 12783 requested an amendment of the application to request an area variance, to comply with the requirements of the new zone. The only difference is that the initial contract purchasers Holland and Lyons had forewarning by eight months in advance of the zone change that they had a zoning deficiency which needed correcting. Holland and Lyons could have corrected the deficiency in the recreational open space requirement immediately and gotten vesting under SP-2. They had adequate time, particularly in view that they needed to redesign the building anyway.

34. The Board is required by statute to give great weight to the issues and concerns of the ANC. In addressing these issues and concerns which are basically identical to the arguments of the appellant the Board finds as follows:

- A. As to the issue raised by the ANC and appellant concerning the effect of the plan modification on the operation of Sub-section 8103.5 the Board finds there has been no such substantial change as to disentitle the Intervenor from the benefit of the saving clause of Sub-section 8103.5. The basic triangular configuration of the structure and its use and general facilities remained unaltered throughout the process, although its height was lowered and the surface treatment varied. These design changes made between the November 2, 1978 plans and the Joint Committee approved plans were mandatory ones, which had to be made by the Intervenor at the command of a District of Columbia agency in order to have the permit issue under D. C. Law 2-144. The Intervenor cannot be denied a right under Sub-section 8103.5 of the Zoning Regulations for complying with more rigorous design requirements of another government agency. The deviation between the November 2, 1978 plans and the requirements for SP-2 structures as to recreation space was minor in nature and could have been corrected

by merely altering the dimension of the penthouse and re-partitioning parts of the lobby space, as noted in Finding of Fact No. 11 above. The changes between the June, 1979 plans and the final plans as to roof recreation area dimension, courtyard dimensions, and record lot were again minor in nature, constituting a deviation of less than two percent according to the testimony of the Zoning Administrator. The imposition of more rigorous requirements as to design, whereby the Intervenor cannot build as high or dense a building as it otherwise could under the Zoning Regulations as a matter-of-right, by an agency of the District of Columbia Government cannot operate to divest the Intervenor of rights accrued under the saving provision of Sub-section 8103.5. According to Sub-section 1301.2 of the Zoning Regulations, and 5-424 D. C. Code (1973 ed.) whenever the provisions of any statute or any other municipal regulations impose higher standards than are required by these regulations, the provisions of such statutes or other regulations shall govern, as a matter of law.

- B. The ANC and the Appellant further contend that no valid permit application existed six months in advance of the zoning change on June 22, 1979 because of non-compliance with the Zoning Regulations on the filing date of November 2, 1979 and that consequently no "vesting" could occur pursuant to Sub-section 4307.3. Sub-section 4307.3 pertains to whether buildings authorized under prior zoning are conforming or nonconforming and is irrelevant to a determination of rights of review of a permit application. The Intervenor's compliance with Sub-section 4307.3 is not an issue before the Board in the present appeal. The Board notes, however, that for reasons stated elsewhere in this order, the application for a permit was pending more than six months prior to the change of zoning.
- C. The contention of the ANC and the Intervenor that the lack of compliance with the provisions of Sub-section 4302.2 barred the effect of Sub-section 8103.5 as a savings clause is without merit. There was no evidence presented that the plans filed on November 2, 1978 were so sketchy or so incomplete as to preclude their being processed by the zoning review staff. The Intervenor's architect testified, as did the Zoning Administrator, that the plans were sufficiently, complete to determine compliance. In fact, minor adjustments would have resulted in total compliance. The opinion of the Corporation Counsel's office, concerning the

present case, dated September 25, 1979 was that sufficient completeness for processing rather than total compliance upon the filing date is what is required for Sub-section 8103.5 to operate as a saving clause. The Board agrees.

- D. The provision of Paragraph 8103.52 invalidating permits not picked up within six months of the effective date of the Zoning Regulations is not applicable to the present case where the approval of both the Mayor's Agent for D. C. Law 2-144 as well as the Zoning Regulations Branch, required by law, was not forthcoming within six months of the effective date of the zoning change and there was no persuasive evidence of unreasonable or dilatory behavior on the part of the Intervenor in modifying the plans to obtain these approvals.
- E. As set forth in Findings No. 31 and 32, the Appellant argues that the BZA is bound by the Corporation Counsel's memorandum of October 16, 1978, and that the subject building must be controlled by the Regulations in effect at the time of the public hearing before the Board. The Board finds that there is a significant difference between Case No. 12783 and the present case. Case No. 12783 required a special exception from the Board, and the applicable controlling provision construed by the Corporation Counsel in that case was Sub-section 8103.6. The subject building required no BZA approval and the controlling provision is then Sub-section 8103.5.

35. On June 10, 1980 the Intervenor filed a Motion for an Expedited Decision on the Appeal based on the increasing daily economic construction costs. The Chair denied the Motion on June 11, 1980. The Intervenor was advised that a decision was scheduled for the Public Meeting of July 2, 1980.

36. On July 2, 1980, as discussed below, the Board DENIED the Appeal. On July 25, 1980 the Appellant filed a Motion to Reopen the Hearing on the grounds that Holland and Lyons were not the lawful owners of the subject property at the time that the application for the subject permit was filed with the Zoning Administrator as is required under Section 107.6 of the Building Code of the District of Columbia. The Board DENIED the Motion as not germane to the basic issue of the subject Appeal by a vote of 3-0 (Leonard L. McCants, Charles R. Norris and Connie Fortune to deny, William F. McIntosh, not present, not voting).


CONCLUSIONS OF LAW:

Based on the entire record the Board concludes that the sole issue before the Board is whether the plans for the subject building filed with the building application on November 2, 1978 with the Zoning Administrator were sufficiently complete to permit processing without substantial change or deviation as stated in Paragraph 8103.5 of the Zoning Regulations. As found in Finding of Fact No. 10 the said plans did not evidence the recreational space and a record lot had not been obtained. In Finding of Fact 11 and 20 the Board finds that the two aforementioned deficiencies were not substantial in nature. The Board notes that only one permit was issued throughout the entire matter. The Board finds that the second and third plans constituted amendments to the original plans filed with the Zoning Administrator on November 2, 1978. The Board concludes that the original plans although deficient in certain respects were sufficiently complete as to allow their processing and that the application for the building permit filed on November 2, 1978 with the Zoning Administrator should be processed under the then applicable SP-2 regulations.

The Board further concludes that it has sufficiently addressed the issues and concerns of the ANC. Accordingly, It is ORDERED that the Appeal is DENIED and the decision of the Zoning Administrator is UPHELD.

VOTE: 5-0 (Charles R. Norris, Walter B. Lewis, Connie Fortune, William F. McIntosh and Leonard L. McCants to deny the Appeal).

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: 

STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 6 OCT 1980

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."